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No. 06-97

In The Supreme Court of the United States

STOLT-NIELSEN S.A.,
STOLT-NIELSEN TRANSPORTATION GROUP LTD.,
AND RICHARD B. WINGFIELD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE GRAND DUCHY OF LUXEMBOURG AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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PURPOSE

Pursuant to Supreme Court Rule 37.2(b), the Grand Duchy of Luxembourg respectfully moves the Court for leave to file an amicus brief in support of the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit in *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177 (3d Cir. 2006).

FACTS

On August 17, 2006, the Grand Duchy of Luxembourg, through its counsel Orrick, Herrington & Sutcliffe LLP, requested the written consent of the United States to the filing of its amicus brief, but has not yet received such consent. Written consent from Petitioners has been obtained and is being filed with the Clerk of the Court.

THE NATURE OF MOVANT'S INTEREST

As an original signatory to the 1957 Treaty of Rome and subsequent treaties which have collectively established the European Institutions and the structures and principles underlying the European Union, Luxembourg has a rich history of fostering international trade and cooperation between friendly democracies. The United States, the Respondent in this case, is Luxembourg's most important non-European trading partner. In 2005 alone, trade between the two countries totaled over $1,170,000,000. Petitioners in this case include Stolt-Nielsen, S.A., which is the first Luxembourg company to be listed on the NASDAQ exchange.

Luxembourg has an equally strong interest in protecting competition in the global marketplace. Competition rules were laid down in the Treaty of Rome and Luxembourg has attached high priority to vigorous,

predictable and efficient observance of applicable competition law rules. An important element of a sound competition policy is an effective leniency program for companies cooperating in cartel investigations. Such programs, if enforced in a transparent and predictable manner, result in enhanced antitrust enforcement, fewer cartels, and stronger global economies.

The Third Circuit's decision creates conflict among the Circuits and thus confusion for Luxembourg companies and other entities as to a private party's right to seek equitable enforcement of a non-prosecution agreement with the U.S. government in a U.S. court. Resolution of that Circuit conflict will provide Luxembourg companies greater certainty with respect to their U.S. trade activities and greater repose in their decisions to assist cartel enforcement endeavors through leniency programs. Such certainty will foster trade between Luxembourg and the United States.

CONCLUSION

For the reasons set forth above and pursuant to Supreme Court Rule 37.2(b), the Grand Duchy of Luxembourg respectfully moves the Court for leave to file an amicus brief in support of Petitioners.

Respectfully submitted,

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 2

1. International Trade Depends On Sound Antitrust Policies Being Enforced In A Predictable Manner 2

2. Luxembourg Urges The Court To Resolve The Split In The Circuits Regarding Pre-Indictment Review of Non-Prosecution Agreements 3

CONCLUSION 3

TABLE OF AUTHORITIES

Source **Page**

AREEDA & HOVENKAMP, ANTITRUST LAW,
(2d ed. 2000)..... 2

The Grand Duchy of Luxembourg respectfully submits this brief as amicus curiae in support of the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit in *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177 (3d Cir. 2006).[1]

INTEREST OF THE AMICUS CURIAE

As an original signatory to the 1957 Treaty of Rome and subsequent treaties which have collectively established the European Institutions and the structures and principles underlying the European Union, Luxembourg has a rich history of fostering international trade and cooperation between friendly democracies. The United States is Luxembourg's most important non-European trading partner. In 2005 alone, trade between the two countries totaled over $1,170,000,000. The petitioners in this case include Stolt-Nielsen, S.A., which is the first Luxembourg company to be listed on the NASDAQ exchange.

Luxembourg has an equally strong interest in protecting competition in the global marketplace. Competition rules were laid down in the Treaty of Rome and Luxembourg has attached high priority to vigorous, predictable and efficient observance of applicable competition law rules. An important element of a sound competition policy is an effective leniency program. Such programs, if enforced in a transparent and predictable manner, result in enhanced antitrust enforcement, fewer cartels, and stronger global economies.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae or its counsel made any monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2(a), Luxembourg is filing the written consent of the Petitioners to the filing of this brief. Luxembourg has not yet received the consent of the United States to the filing of this brief.

SUMMARY OF ARGUMENT

Free trade and international commerce are fostered by eradicating anticompetitive behavior by cartels. Corporate leniency programs play an important role in cartel enforcement, and are most effective when private parties are confident that non-prosecution agreements will be fully respected.

The Third Circuit's decision creates conflict among the Circuits and thus confusion for Luxembourg companies and other entities as to a private party's right to seek equitable enforcement of a non-prosecution agreement with the U.S. government in a U.S. court. Resolution of that Circuit conflict will provide Luxembourg companies greater certainty with respect to their U.S. trade activities and greater repose in their decisions to assist cartel enforcement endeavors through leniency programs. Such certainty will foster trade between Luxembourg and the United States.

ARGUMENT

1. International Trade Depends On Sound Antitrust Policies Being Enforced In A Predictable Manner.

Markets function best and trade flourishes when there is effective antitrust enforcement. *See* AREEDA & HOVENKAMP, ANTITRUST LAW, at ¶ 101 (2d ed. 2000). It is for that reason that Luxembourg, which depends on trade, has been a vigorous supporter of sound antitrust enforcement policies. As discussed below, effective leniency programs have been instrumental to antitrust enforcement and have served as effective deterrents to cartel behavior. When a split exists between U.S. Circuit Courts regarding the enforceability of leniency agreements, however, companies doing business in the U.S. lose the benefits of predictable

antitrust policy. The resulting confusion is a significant impediment to international trade.

2. Luxembourg Urges The Court To Resolve The Split In The Circuits Regarding Pre-Indictment Review of Non-Prosecution Agreements.

The inconsistency between the Third and Seventh Circuits regarding the propriety of pre-indictment judicial review of non-prosecution agreements threatens the consistency and predictability that are hallmarks of the U.S. leniency program.

Greater certainty and predictability regarding the availability of judicial protection for non-prosecution agreements will enhance the effectiveness of the leniency program and encourage continued participation therein. In that same vein, such certainty and predictability will permit Luxembourg companies to make fully-informed business decisions when operating under U.S. jurisdiction.

CONCLUSION

For the reasons set forth above, Luxembourg respectfully urges the Court to grant the petition for writ of certiorari and to review the Third Circuit's decision.

Respectfully submitted,

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